

DOES YOUR TENANT SCREENING PASS A FAIR HOUSING TEST?

By Omar Barraza

This article focuses on the importance of thorough and consistent screening to ensure that you comply with both fair housing and good business practices. While this article cannot take the place of good, sound legal advice, I hope my fair housing frame of mind can be food for thought.

Housing providers of every size should draft a screening policy that will govern decisions regarding the acceptance of tenants. A documented screening policy helps you in two ways:

1. If a fair housing enforcement agency asks why an applicant was rejected, you can provide an objective answer.
2. If an applicant wants to apply for tenancy, you can present your screening policy to him/her for review. An applicant can decide for him- or herself if he/she wants to apply.

Before we get into criteria to consider in your screening policy, let's take a moment for applications. In general, it is safer to take applications on first-come, first-served basis. While some housing providers prefer to accept a block of applications and then choose from that pool, the first-come, first-served policy is a common business practice. For example, when you go to buy a new car, dealers take applications on a first-come, first-served basis. They measure the application against a basic set of criteria before committing to a sale.

To meet fair housing standards, a consistent and sound screening policy measures a potential resident's willingness and ability to pay rent.

Willingness to Pay Rent

An applicant who is willing to pay has a credible history of being a good neighbor who pays rent in a timely manner. Here are some options for conducting screening with sound business and fair housing considerations in mind.

Credit

Defining good versus bad credit can be difficult. The best bet to ensure consistency is to use a screening firm. Screening firms often provide one-stop shopping credit and criminal background checks simultaneously. If you utilize a screening firm, do not automatically accept their procedures as fair housing-safe. Review their policies with a fair housing frame and with these thoughts in mind:

1. **Be consistent.**
2. **Determine the number of acceptable 30, 60 and 90 day late payments.**

3. Are collections acceptable? If a collection is paid and/or more than a year old, it may not be a factor that measures a willingness to pay rent. Moreover, disabled and/or low-income families may have numerous medical collection accounts that don't reflect the ability to be a good tenant.

4. Are bankruptcies okay? Some housing providers don't like bankruptcies while others may allow a bankruptcy that has been discharged. A person whose credit reflects a discharged bankruptcy may be unable to file one against you.

5. If you deny an applicant based on his/her credit report, pay heed to the Fair Credit Reporting Act (FCRA).

One potential issue that can affect your credit decision is the use of credit scores. Most credit bureaus now issue a credit score. If a credit score is below or above a certain number, a housing provider may be instructed to deny a rental application. I recommend that if taking advice from a screening company, you conduct a second review of all denied applications, especially if the denial is based in a credit score. What are the reasons for the score?

Previous Tenancies

Willingness to pay rent in a timely manner means you must verify rental history. Fair housing laws ask only that your policy be consistent and reasonable. Some options:

1. You can request information for a period of years. References over multiple years may demonstrate patterns, providing accurate information about tenancy history.
2. You can request information from a set number of references.

I have seen rental applications that request information on the last three housing providers. This allows a housing provider to speak with more than one housing provider to obtain a complete and (hopefully) accurate history. In general, you want at least one good reference.

You may also want to talk with a friendly lending institution to see what type of residency history they require to make a consumer loan. Your policy should be reflective of the market and banks have taken steps to develop objective and discrimination-free policies. The key is to be consistent in applying your policy!

The ability to pay rent is measured mostly by income. The question remains: What to count in determining income?

The Income to Housing Cost Ratio

The three times income standard is the sacred cow of the housing industry. Most housing providers are comfortable with this policy of requiring a household to make three times the unit rent. I challenge you to reconsider the relevance of this policy now that banks allow families to utilize as much as 50% of their gross income for rent. Some things to consider in developing your ratio policy:

1. The calculation of income should include verifiable employment, asset/interest income, child support, public assistance, social security, retirement/pension, adoption assistance, foster child support, food stamps, veterans benefits, student employment and other types of cash income.
2. Income stability is more relevant than employment history.
3. The income of a household should be aggregated to calculate the ratio, Why? Because family is a cultural term more than a legal term, especially when civil rights laws may recognize sexual orientation, national origin and ancestry as protected classes.
4. When determining the housing cost for a Section 8 participant, you should utilize the participant share of the rent as the basis for the housing cost. Section 8 certificate holders will not be required to pay more than 30% of their adjusted income for housing and utilities. The housing subsidy is the mechanism for ensuring that a low-income family can afford to rent a home.
5. Most credit decisions utilize gross income as the basis for calculating the income to housing cost ratio. I encourage you to "gross up" non-taxed income you such as Temporary Aid to Needy Families (TANF), social security and other types of income. A housing provider can avoid a disparate impact challenge by "grossing-up" a disabled person's fixed income to reflect the taxable income a person would have to earn to net the same amount.
6. So what ratio should you require to approve tenancy? While I cannot conclusively answer this question, I hold that anything greater than the three times standard is problematic from a disparate/fair-housing standpoint. Finally, I think that the income to housing cost ratio should be the definitive measure of an applicant's willingness or ability to pay 50% of gross income for rent and provide sound references, they might be an ideal candidate for your new neighbor.

Additional Considerations

Your screening policy should make some room for domestic violence victims and persons with disabilities. Domestic violence victims may have previously resided with a partner that created the disturbances that led to complaints and/or termination of tenancy. Persons with disabilities may have needed to move because of a disability. Your policy should always be prepared to consider reasonable accommodation request. I promise to address the issue of reasonable accommodation in the near future in this column.

Criminal Background & Identification Checks

Fair housing laws do not ban criminal background and identification checks. However, your policy should be reasonable and consistent. What does a bank require for identification? Most banks accept a driver's license, passport, student identification, state identification card and some types of credit cards.

A reasonable criminal background check policy will consider charges versus convictions and the length of time since violation occurred. Felonies, like bankruptcies, are viewed differently after a certain amount of time has elapsed.

Some Parting Thoughts

Your policy should be designed to look at the whole picture of an applicant. An applicant with a few credit dings may have a good tenancy history. By consistently measuring multiple objective standards, you should be able to gain a full picture of an applicant's willingness and ability to pay.

Reasonable and consistent screening policies have both business and fair housing dividends for a housing provider. I encourage you to document your policy, to share it with applicants and to implement it consistently. You should feel comfortable to have your policy reviewed by any of the local fair housing enforcement resources.

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